

# SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR  
3000 K STREET, NW, SUITE 300  
WASHINGTON, DC 20007-5116  
TELEPHONE (202) 424-7500

[WWW.SWIDLAW.COM](http://WWW.SWIDLAW.COM)

NEW YORK OFFICE  
THE CHRYSLER BUILDING  
405 LEXINGTON AVENUE  
NEW YORK, NY 10174  
TEL. (212) 973-0111  
FAX (212) 891-9598

February 13, 2003

## **VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, S.W.  
Washington, DC 20554

Re: *Ex Parte*  
CC Docket Nos. 01-338

Dear Ms. Dortch:

In this letter, Cbeyond Communications, LLC ("Cbeyond") stresses the need for the Commission to establish a granular test for interoffice transport that realistically assesses the ability of CLECs to obtain transport from wholesale providers or to self provision.<sup>1</sup> The Commission must also assure that that CLECs are able to obtain access on reasonable terms and conditions to competitive transport providers where UNE transport is unavailable. The opportunity to obtain access to competitive transport providers will be even more critical insofar as the Commission in this proceeding restricts to any significant extent the availability of UNE interoffice transport. The Commission must assure that competitive providers are able to establish a presence in ILEC central offices, that ILECs offer cross-connects within the central office on reasonable terms and conditions, and that ILECs do not place unreasonable restrictions on how CLECs may use cross-connects. Unfortunately, as explained further in this letter, some ILECs are not providing nondiscriminatory access to competitive transport providers. Apart

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<sup>1</sup> Cbeyond has previously endorsed the transport test proposed by ALTS. If, however, the Commission imposes a less onerous test, such as that proposed by Allegiance, it is imperative that the two alternative providers provision service over their own facilities instead of merely providing alternative transport via resale of ILEC special access service.

from the detrimental impact on CLEC business plans, Cbeyond is also concerned about the legal sustainability of a granular transport test premised in part on the availability of third party transport providers if the Commission has not adequately taken steps to assure that CLECs can obtain reasonable access to these transport providers.

In fashioning a granular test for interoffice transport the Commission must recognize that there is no economic basis for a finding that CLECs could self-provision transport for DS-1 level service. Nor are there any wholesale providers at the DS-1 level. Accordingly, the Commission may not assume that the existence of a wholesaler or self-provisioner at a higher capacity level warrants any conclusions at the DS-1 level. Accordingly, the Commission should establish in this proceeding a finding of nationwide impairment for DS-1 level transport that excludes them from application of any granular test.<sup>2</sup>

Cbeyond opposes any “contestability” test in any form, including an inference test, that assumes either that because some providers are able to build over a route that each CLEC may build over every route in an area or over specific routes. To the contrary, the fact that some CLECs have built over a route or in an area does not mean that any individual CLEC may as a practical matter build over all the routes over which it needs transport, or that wholesale providers will do so. Accordingly, the Commission should limit its granular approach to a test for interoffice transport to the availability of wholesale providers over a specific route. If the Commission adopts any variation of a contestability inference test, or permits states to do so, the Commission should include a carve-out for DS-1 level transport and loops based on a finding, as described above, of nationwide impairment for transport and loops at that capacity level.

As a part of any framework for transport or loop UNEs, the Commission must establish an approach in which ILECs must provision subject to any claims by the ILEC that it is not obligated to provide the requested UNE. Requiring CLECs to litigate each route-specific UNE request would foreclose CLECs’ ability to provide service on a timely basis.

Cbeyond is also concerned that the Commission might adopt an unreasonably low capacity limit on the availability of transport. Any such limit, should be close to, or at, the OC-12 level. This provides a more realistic assessment of the cross-over point for feasibility of employing dark fiber, which must be available as a UNE wherever lit UNE transport is not available. Cbeyond reiterates that to the extent a DS3 capacity limit or caps are established that such caps should not be applicable to DS1 transport for the same reasons that a DS1 carve-out is appropriate – a nationwide finding of impairment.

In addition to establishing a reasonable granular test for interoffice transport, the Commission must also assure that CLECs are able to obtain service from competitive transport providers. As a foundation requirement for assuring CLECs reasonable access to competitive transport providers, the Commission must first assure that competitive transport providers are able to establish a presence in ILEC central offices. Transport providers that qualify for collocation under Section 251(6) are able to establish collocation arrangements under that Section. However, CLECs such as Cbeyond have in many instances been unable to do so

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<sup>2</sup> For the same reasons cited herein, Cbeyond also opposes any form of a contestability test being extended to loops. A nationwide finding of impairment is similarly appropriate with regard to DSI loops.

because the ILEC claims that the fiber provider is not eligible to establish a collocation under Section 251(c)(6) because the fiber provider does not want to obtain interconnection with the ILEC or access to UNEs. Or, the ILEC claims that the fiber provider is not a carrier. Fiber providers have already explained on the record of this proceeding the difficulties they experience in obtaining reasonable access to ILEC central offices for the purposes of providing competitive transport services to CLECs collocated there.<sup>3</sup> Cbeyond requests that the Commission assure reasonable access to ILEC central offices by competitive transport providers as previously explained by those providers, including permitting them to establish a presence in ILEC central office vaults.<sup>4</sup>

In addition to permitting reasonable access to the central office by competitive transport providers, the Commission must assure that ILECs provide cross-connects in the central office from the CLEC to competitive transport providers. In the *Collocation Remand Order*<sup>5</sup>, the Commission, pursuant to Section 201, required ILECs to provide a cross-connect within its premises if more than a *de minimis* amount of the traffic will be interstate.<sup>6</sup> The Commission found that this requirement would promote competition by permitting collocating carriers “to select the transport provider of their own choosing, rather than being forced to rely solely on the incumbent LEC or their own facilities for provision of that service.”<sup>7</sup> The Commission described at some length the absurdity, absent a cross-connect requirement, of CLECs ordering special access service to reach a transport provider outside of the central office and then back hauling the traffic to the CLEC’s collocation space. In addition to the obligation under Section 201, the Commission found that ILECs were independently obligated to provide cross-connects to collocated CLECs under Section 251(c)(6). Accordingly, the Commission could not have been more clear in requiring ILECs to provide cross-connects to collocated CLECs and that the purpose of this requirement was to permit CLECs efficiently to reach competitive transport providers.

Unfortunately, some ILECs are still erecting artificial and unnecessary barriers to CLECs ordering and obtaining cross-connects to transport providers. Cbeyond has attempted to exercise its right, pursuant to Section 251(c)(6) and interconnection agreements, to obtain reasonable cross-connects to transport providers in SWBT territory. In fact, Cbeyond’s interconnection agreement with SWBT provides and intends that Cbeyond may obtain DS-3 cross-connects for \$1.13 per month. However, although the *Collocation Remand Order* specifically recognized that provision of cross-connects should not involve difficult or unusual arrangements, SWBT continues to insist on treating CLEC requests for a cross-connect to a competitive transport providers as an “augment” of collocation space. It requires Cbeyond to submit a collocation augment application to which collocation provisioning intervals of 90 to as much as 150 days or more apply. In order to assure that it does not need to repeatedly file collocation augment applications in the future each time it may wish to establish a cross-connection with a

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<sup>3</sup> Comments of the Coalition of Competitive Fiber Providers, CC Docket No. 01-338, filed April 5, 2002.

<sup>4</sup> *Id.*

<sup>5</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, CC Docket No. 98-147, FCC 01-201, released August 8, 2001 (“*Collocation Remand Order*”).

<sup>6</sup> *Id.* para. 78.

<sup>7</sup> *Id.* para. 69.

competitive transport provider, Cbeyond must order substantially more connection capability than needed. In consequence, the overall cost to Cbeyond of getting a simple cross-connect is approximately \$4522 in up-front charges in SWBT territory plus recurring charges. In order to avoid this cost and the substantial delay involved in getting a simple cross-connect, Cbeyond frequently orders cross-connects from federal special access tariffs for \$850 per month.

Cbeyond is very concerned that these and other barriers imposed by some ILECs to obtaining cross-connects to competitive transport providers, which should be proscribed in any event, will become even more harmful in an environment potentially arising from this proceeding in which UNE transport is less available and in which, as the Commission envisioned in the *Collocation Remand Order*, carriers should be able “to select the transport provider of their own choosing, rather than being forced to rely solely on the incumbent LEC or their own facilities for provision of that service.”<sup>8</sup> Cbeyond may lose UNE access to DS 3 level transport on most, if not all, of its transport routes under granular tests under consideration in this proceeding.<sup>9</sup> In that eventuality, it will be critical that Cbeyond and other CLECs be able to obtain cross-connects on reasonable terms and conditions to competitive transport providers. Accordingly, Cbeyond requests, as part of any granular test for interoffice transport adopted in this proceeding, that the Commission take steps to assure that CLECs have meaningful rights to co-carrier cross-connects. In particular, the Commission should direct ILECs to promptly provide cross-connects and that they may not treat this as an augment to collocation arrangements

The Commission must also assure that ILECs are not able to impose unreasonable restrictions on the ability of CLECs to use cross-connects. To this point, Cbeyond has experienced difficulty in obtaining cross-connects from BellSouth because that carrier refuses to permit CLECs to deploy Ethernet communications over a cross-connect. BellSouth has failed to provide any justification for this restriction which can seriously harm Cbeyond’s ability to provide competitive service to customers. The Commission should establish in this proceeding that CLECs may not limit communications transmitted by CLECs to any particular transport medium or protocol. More specifically, ILECs should be required to provide cross-connects to collocated CLECs using a variety of cable types including Category 5 twisted pair cable, fiber optic cable, or coaxial cable. Using these physical layer options, DS3, Ocn, and Ethernet (100BadeT and GigE) connectivity (via twisted pair or fiber) would be possible. This type of flexibility is essential to developing business plans in a rapidly changing technical environment.

Finally, Cbeyond stresses in the strongest terms that insofar as the Commission limits the availability of interoffice UNE transport, it will be essential that the Commission prohibit restrictions on commingling, *i.e.* on the connection of UNEs loops to ILEC-provided special access transport or third party-provided transport. If CLECs are not able to “commingle” in this manner, they will be unable realistically to provide competitive services in an environment in which UNE transport is not available. In light of this, the Commission must also ensure that

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<sup>8</sup> *Id.* para. 69.

<sup>9</sup> Letter from Thomas Jones, Counsel for Allegiance Telecom to Marlene H. Dortch, Secretary, CC Docket No. 01-338, filed January 31, 2003.

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ILECs are not able to impose administrative or other barriers that could effectively constitute restrictions on commingling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Pat', with a long horizontal flourish extending to the right.

Patrick J. Donovan  
Counsel for Cbeyond Communications, LLC

Julia O. Strow  
Vice President – Regulatory  
& Industry Relations  
Cbeyond Communications, LLC  
320 Interstate North Parkway, SE  
Suite 300  
Atlanta, Georgia 30339  
(tel) 678 424-2429  
(fax) 678 424-2509  
[julia.strow@cbeyond.net](mailto:julia.strow@cbeyond.net)

cc: Chairman Powell  
Commissioner Abernathy  
Commissioner Adelstein  
Commissioner Copps  
Commissioner Martin  
Christopher Libertelli  
Matthew Brill  
Lisa Zaina  
Jordan Goldstein  
Daniel Gonzalez  
William Maher  
Jeffery Carlisle  
Scott Bergman  
Jeremy Miller